SHORT FORM ORDER

INDEX NO. 1644/05

Supreme Court of the State of New York
IAS Part 43- County of Suffolk

COPY

PRESENT:

HON. ARTHUR G. PITTS

JUSTICE OF THE SUPREME COURT

ORIG. RETURN DATE: 11/27/06
FINAL SUBMIT DATE: 12/21/06
MOTION SEQ. NO.: 001-MG

CHARLES DUGGAN and
ANN MARIE DUGGAN,

Plaintiffs,

-against-

SAHIN HAFIZE,

Defendant.

PLTF'S/PET'S ATTY:
RONALD A. LENOWITZ, ESQ.
7600 Jericho Turnpike, Suite 300
Woodbury, New York 11797

DEFT'S/RESP'S ATTY:
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Hauppauge, New York 11788-5108

Upon the following papers numbered 1 to 15 read on this motion /summary judgment
Notice of Motion/OSC and supporting papers 1-10; Notice of Cross-Motion and supporting papers ____; Affirmation/affidavit in opposition and supporting papers 11-12; Affirmation/affidavit in reply and supporting papers 13-15 Other _____; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED defendant Sahin Hafize's motion for summary judgment is granted under the circumstances presented herein. (CPLR 3212; Insurance Law 5102 (d))

The matter at bar is one for personal injuries sounding in negligence which arose from a motor vehicle accident that occurred on April 13, 2002 on Woodside Avenue at or near its intersection with Route 101, Suffolk County, New York. As a result of such accident, plaintiff Charles Duggan alleges that he sustained a serious personal injury. As a basis of the instant motion, the defendant asserts that the plaintiff has not sustained such serious injury as defined by Insurance Law 5102 (d). Ann Marie Duggan, the plaintiff's spouse, has brought a derivative claim.

Said section provides in part that "serious injury means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the

occurrence of the injury or impairment." (Insurance Law 5102 (d)) In the context of the plaintiff's claims, the term "consequential" means important or significant (***Kordana v. Pomellito,*** 121 A.D.2d 783, 503 N.Y.S.2d 198 , 200 [3rd Dept. 1986] , App. Dis. 68 N.Y.2d 848, 508 N.Y.S.2d 425) The term, "significant" as it appears in the statute has been defined as "something more than a minor limitation of use" and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment." (***Licari v. Elliott,*** 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982])

On a motion for summary judgment to dismiss the complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law 5102 (d), the initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action." (***Rodriguez v. Goldstein,*** 182 A.D.2d 396, 582 N.Y.S.2d 395, 396 [1st Dept. 1992]) Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists. (***DeAngelo v. Fidel Corp. Services, Inc.,*** 171 A.D.2d 588, 567 N.Y.S.2d 454, 455 [1st Dept. 1991]) Such proof in order to be in a competent or admissible form, shall consist of affidavits or affirmations. (***Pagano v. Kingsbury,*** 182 A.D.2d 268, 587 N.Y.S.2d 692 [2nd Dept. 1992]) The proof must be viewed in a light most favorable to the non-moving party. (***Cammarere v. Villanova,*** 166 A.D.2d 760, 562 N.Y.S.2d 808, 810 [3rd Dept. 1990])

By way of his verified bill of particulars plaintiff Charles Duggan alleges that he has sustained the following injuries: An exacerbation of a prior lower back injury syndrome; damage to the associated muscle groups, ligaments, tendons, tissues, epithelial tissues; and trauma injury to his right hip. The defendant in support of the instant motion submits the affirmed report of Arthur Bernhang, M.D. an orthopedic surgeon and unaffirmed reports of radiologists Georgia Carvounis, M.D., Matthew Rifkin, M.D., and orthopedist Barry Kleenman, M.D. Said unaffirmed reports will be considered as they were prepared by the plaintiff's treating physicians or were a result of an examination done at the plaintiff's request.(***Itkin v. Devlin,*** 286 A.D.2d 477, 729 N.Y..S.2d 537 [2nd Dept 2001]).

Dr. Bernhang had an opportunity to examine the plaintiff on June 21, 2006 as well as to review all relevant medical records. As a result of such examination he concluded that " while the examinee presents with extensive subjective complaints and restrictions on examination today, it is my opinion that these complaints and restrictions are not substantiated by, and do not correlate with, objective findings and I find no objective basis for casually related restrictions of his lower back and right hip preventing this examinee from performing his normal daily activities. He is not disabled. There is no causally related permanency." Dr. Kleenman's report dated May 17, 2002 indicated that the X-rays of the plaintiff show no bony abnormalities of the pelvis. Dr. Carvounis' report dated April 25, 2002 states that "radiographs of the right hip and pelvis demonstrate no evidence of fracture, dislocation or osseous abnormality. The hip joint appears normal..... radiographs of the lumbosacral spine demonstrate no evidence of fractures or dislocations. There are no lytic or blastic lesions demonstrated. The height of the vertebral bodies and the intervertebral disc spaces are maintained. The sacroiliac joints appear normal. Dr. Rikkin's report dated June 25, 2002 concluded that "MRI of

both hips for comparison in the axial and coronal views demonstrate no abnormal signal within the bony structures" with an impression of "unremarkable hip MRI." Based upon the foregoing the defendant has demonstrated, as a matter of law that the plaintiff has not sustained a serious injury. (see ***Reeves v. Scopaz,*** 227 A.D.2d 606, 643 N.Y.S.2d 620 [2nd Dept. 1996] ; ***Horan v. Mirando,*** 221 A.D.2d 506, 633 N.Y.S.2d 402 [2nd Dept. 1995])

In opposition thereto the plaintiffs aver that the defendant has failed to meet his burden of establishing that he has not sustained a serious injury as defined by Insurance Law 5102 (d). Specifically he alleges that the affirmed report of Dr. Bernhang is insufficient without probative value because it is based upon an examination conducted four years subsequent to the subject motor vehicle accident. Such position is without merit. (see ***Kravtsov v. Wong,*** 11 A.D.3d 516, 782 N.Y.S.2d 837 [2nd Dept 2004]) The Court notes that examinations and various tests of the plaintiff done immediately after the accident conducted at the plaintiff's request also support the defendant's assertion that the plaintiff did not sustain a serious injury. Other than the afore stated opposition proffered by the plaintiff, he has failed to submit any competent evidence in admissible form which would establish, prima facie, that such serious injury was sustained. Accordingly, pursuant to the foregoing and under the circumstances presented herein, the defendant's motion is granted.

This shall constitute the decision and order of the Court.

Submit judgment.

So ordered.

Dated: Riverhead, New York
March 6, 2007

J.S.C.

_X___ FINAL DISPOSITION ____ NON-FINAL DISPOSITION _____ DO NOT SCAN